

This letter discusses the issue of nexus. See Quill v. North Dakota, 112 S. Ct. 1902 (1992). (This is a GIL).

May 15, 2001

Dear Xxxxx:

This letter is in response to your letter dated April 30, 2001 to Director Glen Bower. Director Bower has requested that I respond to your letter. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120(b) and (c), which can be accessed at the Department's Website at <http://www.revenue.state.il.us/legalinformation/regs/part1200>.

In your letter, you have stated and made inquiry as follows:

The above referenced corporation is a California corporation that for several years had an employee residing in the state of Illinois who made sales calls and generated taxable sales of merchandise within the state for the benefit of the company. The corporation has always collected Illinois sales tax and has always filed the necessary sales and use tax returns with the state of Illinois on the sales generated in the state. Recently the corporation terminated the services of its employee and no longer employs anyone in the state of Illinois to make sales calls. However, the corporation uses commissioned sales representatives, who are employed by an unrelated company in Michigan, to make sales calls within the state of Illinois on behalf of AAA. These representatives will enter the state of Illinois approximately once a month to make sales calls.

The question that we have at this point is whether or not the corporation will need to continue to collect Illinois sales tax on the sales made to Illinois customers and whether they will need to continue to file the sales and use tax returns with the state of Illinois. Based upon the foregoing information the corporation would like to request a ruling from the Illinois Department of Revenue. Please let us know if you need additional information to make a ruling in this case and we will do our best to provide you with the information as quickly as possible.

Determinations regarding the subject of nexus are normally very fact specific. The Department has found that the best manner to determine nexus is for a Department auditor to examine all relevant facts and information. The following guidelines, however, may be useful to you in determining whether your corporation would be considered "a retailer maintaining a place of business in Illinois" subject to Use Tax collection obligations.

Out-of-state retailers are considered to fall within the definition of a "retailer maintaining a place of business in Illinois" (defined in the enclosed copy of 86 Ill. Adm. Code 150.201) when they perform any of the types of activities listed in 86 Ill. Adm. Code 150.201(i). The provisions of this regulation are subject to the U.S. Supreme Court ruling of Quill v. North Dakota, 112 S. Ct. 1902 (1992), in which the supreme court set forth guidelines for determining what nexus requirements must be met before a business is properly subject to a state's tax laws. Quill invoked a two-prong analysis consisting of 1) whether the Due Process Clause is satisfied, and 2) whether the Commerce Clause "substantial nexus" test is met before the state can impose tax collection responsibilities.

The due process test will be met if requiring the retailer to collect state sales tax is fundamentally fair to the retailer. If the retailer intentionally avails itself of the benefits of the taxing state's economic market, then due process is satisfied, Quill at 1910.

Notwithstanding the fact that due process has been met, a business must also have a physical presence in the taxing state in order for the "substantial nexus" test to be met under the Commerce Clause and before a state can impose tax collection responsibilities on an out-of-State retailer. A physical presence does not require an office or other physical building. Under Illinois tax law, it also includes the presence of any representative or other agent of the seller. The representative need not be a sales representative. Any type of physical presence in the State of Illinois, even if temporary, will trigger Use Tax collection responsibilities. Please refer to 86 Ill. Adm. Code 150.201(i)(1).

After applying the above principles to the limited information provided in your letter, we would suggest that your client continue to act as an Illinois Use Tax collector. Due to the fact that your client would have commissioned sales representatives physically present in Illinois soliciting business, we believe that both the due process and physical presence requirement would be met. As stated above, a physical presence does not require an office or other physical building, nor is it necessary for the representatives to be full time salaried employees of the business.

I hope this information is helpful. The Department of Revenue maintains a Web site, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Karl W. Betz
Associate Counsel

KWB:msk
Enc.